

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

10 UNITED STATES OF AMERICA, )  
11 Plaintiff, ) No. CR 05-0381 TSZ  
12 v. ) DEFENDANT'S MOTION FOR  
13 ) NEW TRIAL (F.R.Cr.P. 33)  
14 AKRAM ASWAD ALMUSSA and )  
15 JOSHUA KEBEDE, ) Note For Motion Calendar: December  
16 Defendants. ) 29, 2006

1. Relief Requested. Defendant moves the Court for an order granting a new trial on the basis that substantial justice was not achieved at the first trial.

## 2. Statement of Facts.

#### A. Wrongful Withholding of Material Exculpatory Evidence

Defendant went to trial on November 27, 2006 after having his motion for a continuance denied. The Government had failed to reveal to the defense that it had located a missing witness, Matthew McGhee and that the interview of him had disclosed material exculpatory evidence tending to disprove two of the five elements of the offense of wire fraud and conspiracy. Six business days before the

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2 start of trial, during the time reserved for final preparation of trial documents  
3 due on November 20, 2006 and the preparation of witness examinations, the  
4 Government provided a copy of the report of the investigation, buried within a  
5 thick stack of documents. During October and November, the prosecution had  
6 sent three letters to the defense discussing and disclosing discovery. Throughout  
7 that period the Government was aware of the McGhee exculpatory evidence and  
8 failed to disclose it. None of the three letters mentioned Mr. McGhee. The  
9 letters have all been previously supplied to the Court.  
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12 The Court indicated to the Government that this conduct was beneath the  
13 requirement of *Brady* and chided the Assistant United States Attorney. Despite  
14 the warning, the Government continued to withhold information regarding  
15 Mr. McGhee for apparent strategic reasons. The Government did not want to call  
16 Mr. McGhee, despite having had a multi-hour proffer from him during the  
17 weekend between the first and second week's of trial. During that interview, the  
18 Government learned that he had been discharged from one of his earlier jobs  
19 because of an accusation of sexual misconduct with an employee. The  
20 Government obtained police reports and a letter from the lawyer for Mr. McGhee  
21 in which certain admissions were made. It is apparent from the fax header on the  
22 letter that the Government had possession of the documents during the evening  
23 of December 4, 2006. The Government waited until after the defense had called  
24 Mr. McGhee as a witness late in the day on December 6, 2006 and had spent the  
25 last 30 minutes of that day on direct. The information was not provided until the  
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 2 following morning. By then it was too late for the defense to undo the calling of  
 3 the witness. The defense was forced on Wednesday to make a decision to call the  
 4 witness without having the full information known to the Government. The  
 5 defense had asked the Court on Wednesday, December 6, 2006 for permission to  
 6 call it's last witness on Thursday morning, rather than having to make the  
 7 decision with only 30 minutes left on Wednesday. The Court denied that request.  
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10 The defense obtained the names of four potential supportive witnesses  
 11 from Mr. McGhees' lawyer during the late afternoon of December 6, 2006 and  
 12 did not have an opportunity to interview them before having to make the decision  
 13 about calling Mr. McGhee to the stand. This was not enough time to make  
 14 effective use of the *Brady* information regarding Mr. McGhee. The defense  
 15 timely sought continuances both at the start of the proceedings and before having  
 16 to call the witness. These requests for relief were both denied.  
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18 While the Court has denied the defense motions to dismiss for the *Brady*  
 19 violation and has declined to exercise it's supervisory powers to dismiss the case  
 20 for the violations of the ethical and legal requirements placed upon the  
 21 Government and it's lawyers, it is submitted that due process requires that the  
 22 wrongful consequences, namely a conviction contributed to by such wrongful  
 23 conduct, be undone and that Mr. Almussa be granted a new trial.  
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25 **B. Misconduct in the Presentation of Evidence**

26 The Rules of Professional Conduct require that lawyers proceed with  
 27 candor to the tribunal before which they practice. No lawyer is allowed to  
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wilfully present perjured evidence and lawyers for the Government are under a particular requirement to do justice even if it means that the accused will go free. In this case the Government clearly presented perjured testimony by Mr. Kebede which was designed to put him in a false light that would increase his credibility and make him sympathetic to the jury.

The direct of Mr. Kebede by the AUSA left the following impressions:

1. Mr. Kebede had only been involved in one previous deal before meeting Mr. Almussa.
2. That previous dealing had resulted in no financial gain to Mr. Kebede.
3. Mr. Kebede was best characterized as an ice cream seller with an interest in real estate at the time he met Mr. Almussa.
4. Mr. Kebede first learned about double closings from Mr. Almussa, having never been involved in a double closing before.
5. Mr. Kebede stopped dealing with Mark Koshraw before he met Mr. Almussa, because Mr. Koshraw had cheated him out of his share of that one prior dealing.
6. Mr. Almussa came up with the idea of having false verifications of employment for false job titles.

None of the above was true. Yet when the prosecutor finished his direct examination that was the image he had given the jury through careful and detailed questioning of Mr. Kebede. While the prosecutor offers an excuse based

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2 upon a pre-trial order, that order only dealt with certain prior transactions; not  
3 the myriad of other false poses recited above. What's more, that pre-trial order  
4 did not give the Government license to paint with half-truths and mislead the  
5 jury at Mr. Almussa's expense.  
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7 To put this in context, the Government had long been aware that Mr.  
8 Kebede had actively suborned perjury and was of doubtful character. That  
9 should have put the Government on special alert to be careful with the witness.  
10 Having solicited the testimony that created this false image, the Government had  
11 a duty to correct it; not leave it to the defense to attempt to counter on cross  
12 examination. No one can say with confidence that the efforts of the defense made  
13 up for this elaborate disguising of Mr. Kebede. Cloaked in false colors, the trial  
14 was stained by the lies of this man, solicited through the careful guidance of an  
15 experienced prosecutor. The Government has come away with a conviction at the  
16 expense of the appearance of fairness.  
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19 While the Court may well have concluded that the Governmental  
20 misconduct did not justify dismissal, it should not permit the conviction of Akram  
21 Almussa to rest on a performance such as this. No one can say that the jury was  
22 unaffected by the testimony of Mr. Kebede.  
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24 Even after this Court rebuked the prosecution for its conduct, it happened  
25 again. In the testimony of Nancy Llander the Government solicited testimony  
26 as follows:  
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1. Ms. Lalander met Mr. Almussa on two occasions.
2. On the first occasion Mr. Almussa interviewed her and obtained financial information that included her income and place of employment.
3. On the second occasion she was asked to sign various loan documents by Mr. Almussa.

This story was not true and the attorneys for the Government knew it.

The unequivocal statement reported in the FBI investigatory report was that Ms. Lalander met Mr. Almussa on only one occasion for the purpose of signing documents, not supplying information. It was Mr. Kebede who met and interviewed her initially, not Akram Almussa. The lawyers for the Government knew this because they had that report. But, when false information was given, the lawyers for the Government let it stand and did nothing to correct it.

If the transcript were available there would be other examples. For instance, the Government had Ms. Estes testify that Mr. Almussa interviewed her and obtained financial information on a draft Uniform Residential Loan Application (HUD form 1003). In fact Defendant's Exhibit 42 demonstrated that she filled out one of the 1003s that Mr. Kebede was handing out (the form that Mr. Khosraw had supplied that said Premiere Mortgage) and had faxed it back to Mr. Kebede.

Ms. Raquel Sahagun was put on to testify that she directly supplied financial information to Mr. Almussa. The Government had interviewed Ms.

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2 Sahagun and Mr. Gonzalez. It turned out that the form was filled out by  
3 Mr. Gonzalez while sitting with Ms. Sahagun; not by Mr. Almussa.

4       This was a trial peopled by perjurers, suborner's of perjury and straw  
5 buyers each of whom had greater interest in avoiding prosecution. A criminal  
6 conviction should not be an opportunity to lead such a parade without exercising  
7 the utmost care to insure that justice is not compromised. The attorneys for the  
8 Government showed little concern for such niceties and the result is one in which  
9 no one should be proud to have been a participant. It would be a black mark on  
10 justice to allow a conviction in such a trial to stand.  
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13       3. Statement of Issues. Should the Court permit the conviction of Akram  
14            Almussa in a case replete with instances of perjury and in which the  
15            Government introduced evidence that it knew to be false and failed to  
16            correct that evidence?

17       4. Evidence Relied Upon. The defense relies upon the transcript of the  
18            testimony and the declaration of Robert J. Wayne filed in support of this motion.

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20       5. Authority.

21       As outlined above the Government presented the testimony of witnesses in  
22            such a manner as to put the key Governmental witness, Joshua Kebede, in a false  
23            and more sympathetic light. Having solicited testimony that it knew to be false,  
24            the Government failed to correct it and even attempted on re-direct to re-  
25            emphasize and re-establish the assertion that Mr. Kebede had first learned about  
26            double closings from Mr. Almussa. Despite a judicial rebuke for this conduct, the  
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2 Government again failed to correct false testimony presented by Ms. Lelander  
3 that she had provided financial information directly to Mr. Almussa, when in fact  
4 the Government knew that the information had been given to Mr. Kebede.  
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6 Numerous other instances of false testimony dot the transcripts of the testimony  
7 of Ms. Sahagun, Ms. Estes, Mr. Gonzalez and others called by the Government.  
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9 There are two precedents that are of the greatest importance here. The  
10 first is *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)  
11 and the second is the Ninth Circuit's en banc ruling last year in *Hayes v. Brown*,  
12 399 F.3d 972 (2005) (en banc).

13 The rule in *Napue* is that a conviction based in part on false testimony that  
14 is uncorrected by the Government cannot stand if the testimony is at all material.  
15 Mr. Kebede's testimony went to the heart of the Government's case, describing  
16 the manner and means of both the conspiracy alleged in Count I and the scheme  
17 alleged in all the remaining counts. The defense called this to the attention of the  
18 Court in a timely manner and moved at the end of the case for the harshest  
19 remedy, dismissal of the indictment. The Court did not grant that motion, as  
20 motions for dismissal are disfavored in the law. That does not end the inquiry.  
21 *Napue* and its progeny stand for the proposition that a criminal conviction cannot  
22 rest on the uncertainty of justice created by the introduction of such evidence.  
23 The case also represents the intention of the High Court to create a massive  
24 deterrent to Governmental misconduct, consistent with the continued ability to  
25 mount a proper prosecution of the accused.  
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28 DEFENDANT'S MOTION FOR  
A NEW TRIAL (RULE 33) - 8

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A conviction obtained by the introduction of perjured testimony violates due process if (1) the prosecution knowingly solicited the perjured testimony **or (2) the prosecution failed to correct testimony it knew was perjured.** *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). ``A new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury." *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (quoting *Napue*, 360 U.S. at 271, 79 S.Ct. 1173) (internal quotes and alterations omitted).

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*United States v. Vaziri*, 164 F.3d 556, 563 (10th Cir. 1999)(emphasis added).

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The failure to correct false testimony is a wrong in itself. It would be too easy for the prosecutor to hide behind the notion of surprise at hearing testimony from the witness that he knows to be false. Rather than countenance a position of surprised observer, the highest court in the land made it clear that the prosecutor has a duty to correct the testimony; not rely upon the attempts of the defense to do so later, or the contradiction by other evidence. When the false testimony emerges a prosecutor cannot just look the other way and move on. It is submitted that in this case the Government's actions were far worse than simply looking the other way in regard to Mr. Kebede. With that witness the prosecutor wove the fabric of the very deceit, having Mr. Kebede testify that he had been in but one earlier transaction and in that he had received nothing of value.<sup>1</sup>

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<sup>1</sup> The prosecutor made the argument that he was precluded from mentioning any previous transactions by virtue of a pre-trial order. That argument is disingenuous on its face given: a) the AUSA had the witness testify about a previous transaction (Carole King), the one in which he claimed to have been cheated by Mr. Khosraw; and b) the limitation was in the context of previous transactions involving Mr. Almussa, not Mr. Kebede. If that was truly the belief of the Government, than it would not have introduced the "I was cheated" transaction as a prelude to it's evidence against Mr. Almussa by Mr.

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As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in *Pyle v. Kansas*, 317 U.S. 213 (1942). In *Napue v. Illinois*, 360 U.S. 264 (1959), we said, "**the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.**" *Id.*, at 269. Thereafter *Brady v. Maryland*, 373 U.S., at 87, held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." See American Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function § 3.11 (a). When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule. *Napue, supra*, at 269. . . . A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . ." *Napue, supra*, at 271.

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*Giglio v. United States*, 405 U.S. 150, 153-54, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (emphasis added).

The test is whether the conduct of the prosecution is such as to undermine confidence in the outcome of the trial. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

Last year the Ninth Circuit en banc undertook the review of a *habeas* petition in which the petitioner had been convicted of murder. In that case the state of California had procured the testimony of a possible co-participant through an arrangement that involved transactional immunity and dismissal of other charges. Realizing that such a deal would compromise the credibility of the witness, the prosecutor had a clever idea. He made the deal with defense counsel

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<sup>1</sup>(...continued)  
Kebede. Certainly, it does not provide license to create a false and misleading impression of Mr. Kebede to heighten his credibility before the jury.

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2 with the promise that the defense lawyer would not reveal the existence of the  
3 deal to his client, the potential witness. Thus, the witness would not be engaging  
4 in perjury in denying that he was testifying because he had a deal to protect  
5 himself; he would be unaware of the deal and lack the *mens rea* of perjury. At the  
6 same time his value as a witness would not be compromised. The Ninth Circuit  
7 granted *habeas* relief and vacated the judgment of conviction.  
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9 The Supreme Court has long emphasized "the special role played by  
10 the American prosecutor in the search for truth in criminal trials."  
11 *Strickler v. Greene*, 527 U.S. 263, 281, 144 L. Ed. 2d 286, 119 S. Ct.  
12 1936 (1999). As we observed in *Commonwealth of The Northern  
Mariana Islands v. Mendiola*, 976 F.2d 475, 486 (9th Cir. 1992)  
(citations omitted), *overruled on other grounds by George v. Camacho*,  
13 119 F.3d 1393 (9th Cir. 1997) (en banc):

14       The prosecuting attorney represents a sovereign whose  
15 obligation is to govern impartially and whose interest in  
16 a particular case is not necessarily to win, but to do  
17 justice. . . . It is the sworn duty of the prosecutor to  
assure that the defendant has a fair and impartial trial.

18       One of the bedrock principles of our democracy, "implicit in any  
19 concept of ordered liberty," is that the State may not use false evidence  
20 to obtain a criminal conviction. *Napue v. Illinois*, 360 U.S. 264, 269, 3  
21 L. Ed. 2d 1217, 79 S. Ct. 1173 (1959) (internal citation omitted). Deliberate  
22 deception of a judge and jury is "inconsistent with the  
rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S. 103,  
112, 79 L. Ed. 791, 55 S. Ct. 340 (1935). Thus, "**a conviction  
obtained through use of false evidence, known to be such by  
representatives of the State, must fall under the Fourteenth  
Amendment.**" *Napue*, 360 U.S. at 269 (citations omitted). "Indeed, if  
23 it is established that the government knowingly permitted the  
introduction of false testimony reversal is 'virtually  
24 automatic.'" *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir.  
1991) (quoting *United States v. Stofsky*, 527 F.2d 237, 243 (2d Cir.  
25 1975)).  
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1                   **In addition, the state violates a criminal defendant's**  
 2 **right to due process of law when, although not soliciting false**  
 3 **evidence, it allows false evidence to go uncorrected when it**  
 4 **appears.** See *Alcorta v. Texas*, 355 U.S. 28, 2 L. Ed. 2d 9, 78 S. Ct. 103  
 5 (1957); *Pyle v. Kansas*, 317 U.S. 213, 87 L. Ed. 214, 63 S. Ct. 177  
 (1942).

6 *Hayes v. Brown*, 399 F.3d 972 (2005) (en banc) (emphasis added).

7                   It is all too easy to underplay the misconduct here by saying that the cross-  
 8 examination undid the harm. Such a conclusion would require the Court to  
 9 second guess the mental processes of twelve independent jurors. The perception  
 10 of the credibility of defense counsel in their minds is not known. A skillful and  
 11 articulate prosecutor had stood before them and urged testimony. Even after  
 12 soliciting the mis-information, that prosecutor repeatedly argued to the Court  
 13 that what he had done was somehow proper because of a pre-trial ruling. The  
 14 jurors, who did not hear that argument, nevertheless saw a prosecutor who was  
 15 never rebuked before them for the misconduct and whose true-believer  
 16 confidence never waned. They may have chosen to believe that the cross-  
 17 examination was so much smoke and mirrors and that the witness, Mr. Kebede,  
 18 had truly learned double closings from the accused and accepted the balance of  
 19 his testimony. Indeed, on re-direct the prosecutor again questioned the witness  
 20 about learning his craft from Mr. Almussa and had him repeat his assertion.  
 21 Thus, it would be hubris on the part of the undersigned to suggest that cross-  
 22 examination undid all the damage and established the truth. It would be wishful  
 23 thinking on the part of anyone else to say that there was not "any reasonable  
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2 likelihood" that the false testimony "could have affected the judgment of the  
3 jury."<sup>2</sup> *Hayes, supra* at 988.

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5 Under the test of "could have affected" the inquiry is one of potential  
6 effects. If the jury devalued the cross examination or considered it collateral to  
7 the issues than the jury might well have continued to believe in Mr. Kebede, who  
8 stood to lose his plea bargain if his testimony was not honest. What did the jury  
9 actually believe? We will never know. But, the question of whether the jury  
10 could have believed in evidence that affected their judgment deserves to be  
11 answered in the affirmative.

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13 There are two additional considerations to be taken into account. In  
14 closing argument defense counsel told the jury that the knowing solicitation of  
15 false testimony "cast doubt" over the entire prosecution.<sup>3</sup> However, if the  
16 Government had followed it's ethical and legal obligations to correct the evidence,  
17 the force of the defense argument would have been infinitely stronger. The effect

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21 In assessing materiality under *Napue*, we determine whether there is  
22 "any reasonable likelihood that the false testimony could have affected  
23 the judgment of the jury;" if so, then "the conviction must be set  
24 aside." *Belmontes v. Woodford*, 350 F.3d 861, 881 (9th Cir. 2003)  
(quoting *United States v. Agurs*, 427 U.S. 97, 103, 49 L. Ed. 2d 342, 96  
S. Ct. 2392 (1976)).

25 Hayes, *supra* at 984. This standard does not require the Court to determine that the  
26 testimony actually did affect the jury; rather the inquiry is whether it had the  
potential to do so, in other words that it "could" have done so.

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28 <sup>3</sup> The Court had just instructed the jury that the comments of counsel  
are not evidence and are meant only to help interpret the evidence.

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2 of such a correction of a witness' false testimony was noted by the en banc Circuit  
3 Court in *Hayes*.

4       The violation of the State's independent duty under *Alcorta* and  
5 *Pyle* was also material, perhaps even more so. To avoid violating  
6 Hayes's due process rights by allowing false evidence to go uncorrected,  
7 **the State would have been forced to disclose** to the jury after  
8 James testified that James's testimony concerning the lack of a deal  
9 was false; that a secret deal was in place concerning prosecution for the  
10 other crimes; and **that the State had solicited James's testimony to the contrary knowing that he would be providing false evidence. Such a disclosure would have had a devastating effect on the credibility of the entire prosecution case.**

11 *Hayes* at 988. The defense in this case was denied the ability to do so with any  
12 apparent effect on the outcome.

13       Finally, a basis for imposing the remedy of a new trial is not only to insure  
14 that this verdict does not rest upon perjured testimony, but also to create a real  
15 deterrent to prosecutorial misconduct in the solicitation of false evidence. That  
16 goal has yet to be achieved in this case. Consider that on the threshold of  
17 starting this trial, the Court was confronted with the suppression of *Brady*  
18 information concerning Mr. McGhee until six business days before the trial. The  
19 Court also took under submission a defense motion to dismiss for the violation  
20 and verbally admonished the prosecutor. The Court was clearly trying to send a  
21 message to the prosecution that they were too close to an ethical line and that  
22 they had better steer clear. That point was either lost on the U.S. Attorney's  
23 Office or ignored.

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2 Before the Court had even ruled on the *Brady* issue, the prosecutor was off  
3 soliciting the false testimony of Mr. Kebede. Again the Court was unequivocal in  
4 its condemnation of this behavior, telling the prosecutor that this was not fair  
5 advocacy at all and that it was far short of the lofty goals of a fair trial. But, even  
6 after receiving that rebuke, there was a repeat of this behavior in the re-direct  
7 examination and a variance on the pattern in the examination of Ms. Lalander,  
8 with the uncorrected error in regard to the recipient of the financial information  
9 at the first meeting.

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11 If deterrence matters, than the Court's goal was not attained. Two  
12 prosecutors have now learned how much they can get away with without  
13 repercussions. The fairness of the product of two weeks of trial before a federal  
14 court stands in grave question and no lasting lesson has been drawn. The  
15 prosecution should not be allowed to thwart justice. The defendant should not be  
16 the one to lament at length the abridgment of proper and ethical conduct. This  
17 Court should order a new trial so that any conviction is one that follows from an  
18 legitimate record.

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22 **Mr. McGhee and the Late Disclosure of Brady and Impeachment**

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24 **Evidence.**

25 As noted above, the defense sought a continuance before the start of the  
26 trial so as to be able to make an efficient use of the late disclosed information  
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2 regarding Mr. McGhee. That would have permitted an investigation into his  
3 alleged supporting witnesses.

4 That was followed up by the denial of a thirty minute delay in offering  
5 Mr. McGhee's testimony. The defendant was put into the position of having to  
6 call his last witness, Mr. McGhee, at the end of the day on Wednesday before he  
7 was able to conduct the investigation of the possible supporting witnesses, whose  
8 names had just been provided. The defense was forced to commit to a course of  
9 testimony that may have proven fatal to it's position.

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11 Unknown to the defense, the Government had obtained police reports and  
12 a letter regarding Mr. McGhee. Despite repeated warnings to the Government  
13 lawyers about late disclosure of information, the Government withheld that  
14 information until the following morning, after Mr. McGhee had taken the stand.  
15 Under these circumstances, the importance of that 30 minute delay became all  
16 the more significant. It is submitted that the cumulative effect of the rulings  
17 concerning Mr. McGhee had the effect of prejudicing the defense of Mr. Almussa  
18 and necessitate a new trial.

19  
20 **CONCLUSION**

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22 If deterrence is a goal in order to protect the integrity of the Court, then it  
23 has not been achieved. A criminal conviction should not be allowed to rest on a  
24 record such as this. But, moreover, the Court should not let this case be a model  
25 of how much can be tolerated and still sustain a verdict that will forever change  
26 the course of this man's life; his liberty, his integrity and his ability to remain in  
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2 this country with his wife and child. It is one thing to witness the conduct that  
3 went on during the trial; it is another to sanction it.  
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5 Dated this 16th day of December, 2006.  
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8 ROBERT J. WAYNE, P.S.  
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10 ROBERT J. WAYNE, Attorney  
For Defendant, Akram Almussa  
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**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of this document and the Declaration of Robert J. Wayne in support of the motion for a new trial were served upon counsel of record at their E-mail addresses via the ECF system in place in the Western District of Washington, on this 16th day of December, 2006.

Dated this 16th day of December, 2006 at Seattle, WA.

/s/ Robert J. Wayne